

Apportionment of Collision Liability

A Survey of Nordic Maritime Collision Case Law

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Deadline for submission: 09/03/2007

Number of words: 17,535

28.08.2007

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1 Introduction

The aim with this thesis has been to get a better understanding of collision liability between vessels. There is not much updated literature within the Nordic field on this subject. I have therefore studied Nordic collision case law from 1973 and to this day.

I have divided the objective of the work into two main parts. First I have concentrated on the International Regulations for Preventing Collisions at Sea 1972 (the Colregs). These are the rules of the road to the mariner and a good understanding of these is vital in order to understand the collision liability between vessels. Some of them are quite simple and absolute rules which do not require much consideration, they are however supplemented with some more generally rules which serves as a guidance upon how to perform the navigation of the vessel. These rules of guidance can only be fully understood by knowledge of case law. I have therefore studied Nordic collision case law from 1977, which where when the present set of rules were put into force. I have included both civil collision cases and public prosecutions against officers on watch (OOW) subsequent to collisions.

The second main objective of the work has been to investigate the actual apportionment of liability. I have looked at the Collision Liability Rules in the Norwegian Maritime Code of 24 June, 1994, no. 39 (MC) in relation to Nordic collision case law from 1973, and tried to see whether there is any general tendency of how the liability has been apportioned and also if the different apportionments can be said to contain any characteristics. In this investigation I have only looked at civil collision cases. I have only concentrated on the liability between ships; not liability between vessels and bridges or docks, neither liability to owners of cargo, passengers or other third parties. I chose to include case law from 1973

since Frode Ringdal has written an account of collision case law for the period from 1923-1972. I was curious to see how the case law had developed.

However, with regard to the first main part concerning the Colregs, I have not attempted to give a complete account of case law in relation to all the relevant Colregs. The thesis has got a maximum restriction on 18000 words and a full account would require much more space. Even though my investigation included all the relevant Steering rules, I have for the purpose of this thesis only included a thorough survey of the two most frequently used rules: Rule 5 – Look-out and Rule 6 – Safe Speed. Both are rules within the category mentioned above, which serves as a guidance to the navigation. In order to avoid the thesis from appearing to incomplete, I have also written some very short accounts of the other most frequently used rules in the Colregs, which are relevant in the process of apportioning liability.

1.1 Methods

I have used Lovdata as source of Nordic case law. While reading the cases I also tried to systemise the main contents such as which rules had been in use, main facts, apportionment of liability, etc in Excel in order to get a better overall picture. The Excel list was a very good tool to fresh up the memory while I was writing.

2 The Colregs

2.1 Introduction

Ships travel world wide and it is quite evident that seafarers need a common set of rules upon how to manoeuvre and navigate in relation to each other, in order to avoid confusion and chaos by too many varying local rules. Several centuries of development has led to the Convention on the International Regulations for Preventing Collisions at Sea 1972 (the Colregs), which were agreed upon at an international conference organised by the International Maritime Organisation (IMO) in 1972, and put into force in 1977. The Convention is adopted by 144 contracting states which covers 98% of the world tonnage¹, and is given application “to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels”, cf Colreg rule 1 (a). Applicability and enforcement is determined in relation to the flag of the vessel and the location. Coastal states have jurisdiction under the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to extend the rules to foreign vessels, other than public vessels, within the adjacent territorial sea, even if the vessel is on an innocent passage, cf UNCLOS article 21².

The 1972 Collision Regulations is divided into five major parts:

Part A General

Part B Steering and Sailing Rules

Part C Lights and Shapes

Part D Sound and Light Signals

Part E Exemptions

¹ www.imo.org/Conventions

² Allen (2005) p.56

Part B is the most interesting part in relation to this Thesis. It is divided in three subsections:

Section I Conduct of Vessels in any Condition of Visibility

Section II Conduct of Vessels in Sight of One Another

Section III Conduct of Vessels in Restricted Visibility

Section I – rule 5-10 - serves mainly as a mandatory guidance upon how to perform the navigation in order to avoid close encounters or risk of collision situations; e.g. safe speed, proper look-out, no assumption to be made on the basis of scanty information, action to avoid collision to be positive, made in ample time and with the observance of good seamanship, etc. Section II consists mainly of more or less absolute manoeuvre rules, and Section III of guidance upon how to manoeuvre in restricted visibility.

I will start by giving a thorough account of rule 5 and 6. Then I will give a short presentation of rule 7, 8 and 9, which also are relevant in the context of apportionment of liability for collisions. Thereafter I will very shortly mention the headlines of the manoeuvre rules in Section II and finally I will briefly give an account for rule number 19 in Section III regarding restricted visibility.

2.2 Duty to maintain proper look-out – Rule 5

2.2.1 Introduction

Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

The rule refers both to the duty of the OOW to at all times, during his or her service as navigational officer, to keep a proper look-out in order to have sufficient overview of the situation; and to the additional duty of having a seaman dedicated solely to the role as look-out when the circumstances so requires. The latter is to report any lights, vessels or large floating objects which he or she sees, and, in low visibility, any fog signals which can be heard. The extra look-out is to be posted during the dark hours of the night and sometimes at day, especially when the visibility is restricted. When considering the sufficiency of this extra look-out, the Courts are likely to take into account the number of seamen available in addition to the state of visibility, probability of meeting other vessels and some other factors. No definite rules apply. At night in areas with heavy traffic, even relatively small vessels may be expected to have a man posted on look-out, while out in the open ocean the degree of look-out might be relaxed even on large ships if other vessels are infrequently seen and are unlikely to be encountered.

I will mention some examples from case law where the duty to maintain proper look-out has been central. The requirement that proper look-out shall be exercised at all times, also when conditions are good, is perhaps self-explaining and became quite evident in ND-1991-220. The master of a 99gt coaster was held to have caused a collision with a surfaced submarine by grossly negligent navigation. Despite the daylight, calm sea, good weather and visibility, the master did not at all observe the submarine coming from starboard. The court found that the vessels had been within visibility of each other for more than 15

minutes before the collision. During this time the master of the coaster focused more or less completely on another ship which he knew.

The failure of not having an extra look-out was emphasised in the distribution of liability after the collision ND-2001-254 Risholm - Lofotferje I. Lofotferje I was the privileged vessel but was apportioned 1/3 of the liability mainly because of its failure to maintain a proper look-out. It was dark and the person dedicated to serve as a look-out was ordered to shovel snow instead of maintaining his duty as look-out. The OOW was for a short period before the collision occupied with adjusting his radar and did therefore not see the navigational lights of the fishing vessel on his port side. The judge emphasized that “Lofotferje I is a larger vessel which frequently passes a fairway with high traffic density, and that the master sailed without look-out despite that he was aware of the fact that he could expect other vessels on crossing courses”.

Risholm which is a mid-sized fishing vessel, with a total length of about 20 metres and probably a limited number of crewmembers, was not criticised so explicitly for not having an extra lookout, but the master was found to have been negligent by inattention in a harbour area with high traffic density. Despite having observed the navigational lights of an engine powered vessel on his starboard side some minutes earlier he failed to monitor the situation more closely, and this was found to be negligent with regard to the duty of maintaining sufficient look-out.

Another ferry-collision case that focuses on the duty to maintain proper look-out is the ND-2001-157 Strand – Vitin. In this case the ferry Strand actually had an extra look-out, positioned on the bridge along with the master. Despite good visibility within sheltered waters, both the master and the look-out failed to observe the cargo ship Vitin which was coming with reduced speed from the port. The master of Vitin had tried to attract their attention both by VHF-call and sound signals. The crew on Strand did not observe Vitin before at a distance of 50 metres. Strand was given the full blame for the collision and the failure to keep a proper look-out was along with the duty to give way the major argument

for the apportionment. The Supreme Court stated that: “The lack of look-out to starboard for a continuous period of ten minutes must be considered to be very blameworthy. The explanation of why Strand did not observe Vitin is of minor importance. Dirty windows can be cleaned. Reflection by the sun can be counteracted by the use of sunglasses. If such easily implemented preventive measures are not sufficient, then the radar can be used and the speed can be reduced. Strand did not take any preventive measures at all. Subsequently the vessel did not maintain its duty to give way. Strand is by this guilty of grossly failures to comply with Collision Regulations 5 and 15”.

As a part of the evaluation of the failure to comply with the duty of look-out the court also emphasised Strand's lacking response to the VHF calls from Vitin: “The reason for not hearing the calls was of minor importance. The radio could have been shut of, the volume turned down, background noise too high or the crew may have simply been inattentive. In any circumstance it is a breach of the duty to keep a proper radio watch.”

2.2.2 Extra attention in certain areas or under certain conditions

Proper look-out is naturally one of the keystones in the collision avoidance procedures and also in the term “good seamanship”. Failure to comply with this weighs heavily in an evaluation of faults, even though the vessel was not the give way vessel. It is even more highlighted if the failure takes place in an area or under a condition which requires extra attention, like mentioned in the start above, during the dark hours of the night, reduced visibility, areas of high traffic density etc. The ND-1995-115 *Trekroner – Klitjyden* case illustrates this. The fishing vessel *Klitjyden* had been lying more or less still and was literary run down when she was fishing, her master was found to be particularly blameworthy for not having secured his vessel by sufficient look-out in an area with quite high traffic density.

In ND-2003-5 Laponia – Nortrader the master of the local ferry Laponia was charged and convicted for negligence in his service as a seaman after a close encounter with the cargo vessel Nortrader. The ferry had been navigating within a relatively narrow channel, with quite high traffic density and at the moment restricted visibility due to fog. The master was found to be negligent for not having set an extra person to serve as a look-out or for not having made proper use of the person he looked-upon as a look-out. In addition, the charge for negligence with regard to the duty of look-out also included failure to monitor the VHF-channel which was used by the Vessel Traffic System (VTS) and failure to make use of the radar.

2.2.3 Look-out by the use of instruments

The term in Colreg 5: “By all available means appropriate”, have always been interpreted by the courts as including the effective use of available instruments and equipment, in addition to the use of both sight and hearing. This applies particularly to radar, but also the use of binoculars and information received by VHF from a VTS or other ships would be included in the term “all available means appropriate.”³ Most likely also information by Automatic Information System (AIS) would be included, even though I have not yet found any collision cases discussing the use of AIS. Some authors of nautical articles states that this instrument will be very important for future look-out duties and also a future revision of the Collision Regulations, since it transmits automatically information about the meeting vessels speed, heading, type, characteristics, etc; thus making the extraordinary rules in Colreg 19 superfluous. The nautical authors might prove to be right one day, but it is a long way to go since the system is still subject to several sources of errors that have an impact on the accuracy of the system. Also very few smaller vessels have the system installed and the smaller vessels neither have radar, ECDIS or any accurate Electronic Chart Display ECD, which is a precondition to make use of the information in an effective way.

³ Cockroft 1996) p.20

However, failure to make use of information by the AIS that e.g. a fully laden tanker is on a heading which involves risk of collision, will most likely be looked upon as a failure to maintain proper look-out, similarly as the failure to make use of information from a VTS like in ND-2003-5 Laponia-Nortrader mentioned above. There are several other examples from case law of failure to maintain look-out by the help of instruments, e.g. ND-1994-64 Olfert Fischer – Øresund cf the chapter of 80/20 apportionments or ND-2000-306 Gardway - Corona. Foreign case law also shows that the duty to make use of instruments to maintain look-out also applies in clear visibility.

According to the theory a proper look-out also includes paying attention to what is happening aboard own vessel; e.g. keeping a check on the steering and seeing that equipment required for keeping the vessel on course is functioning correctly.⁴

2.2.4 Look-out while anchored

The duty to maintain look-out also applies while anchored, especially in circumstances where forces of wind or currents can cause dragging of the anchor, or if the anchorage is exposed to passing vessels. In ND-1979-275 the master of a fishing vessel was fined after his vessel had been run down while anchored in such an exposed area. The court stated that: “The extent of the look-out duty must be determined in each case, but one could at least expect that the crew, at suitable intervals maintains proper look-out”.

⁴ Cockcroft (1996) p. 23

2.3 Safe Speed - rule 6

2.3.1 Introduction

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into consideration: For the complete list please confer the Colregs.

From the time the steamships started to appear on the scene, speed has been an important element of the nautical rules of the road. In the present set of rules the obligation to proceed at safe speed is perhaps the most important risk management factor. Excessive speed reduces the time available to detect and assess developing risks and to take effective avoiding action. High speed also increases the potential of more devastating damages if a collision should incur. The total overview after investigating Nordic collision cases shows that this is the rule in the Colregs which has been most frequently used by the courts.

The safe speed requirement appears twice in the Collision Regulations. First in rule 6, which is applicable to all conditions of visibility, and then in rule 19(b), which is applicable in low visibility. However, also rule number 2, responsibility, due care and practice of seamen, is of importance when considering safe speed.⁵

Rule number 6 enumerates a list of extensive, but not exhaustive, risk assessment factors to be considered by the mariner when determining what would be safe speed under the circumstances. As a starting point the rule sets an objective standard, but the result of what is to be considered may be different for two ships in the same collision. Each vessel must apply the factors to the particular circumstances and conditions. If the circumstances change, the assessment of speed must be reassessed in the light of the changes.

⁵ Stuland (1984) p. 46

There have been some attempts at finding a clearer and more comprehensive understanding of what is to be considered safe speed. IMO has discussed diagrams with average stopping or turning distances seen in relation to ships mass, speed, breaking effect, etc. However this has only ended in an obligation for each ship to have its own manoeuvring data displayed on the bridge. The number of varying factors is too great for a more accurate common approach to succeed. The manoeuvre data must e.g. be seen in relation to visibility, number of vessels in the area, how much room there is to manoeuvre, experience of the crew, tiredness, whether the ship is fitted with radar, etc. Earlier case law also had a rule of thumb that a vessel navigating in restricted visibility should be able to stop at half the visible distance. This is however no longer a valid guidance in modern case law, at least not if the involved vessels are equipped with radar.

By indicating that the listed factors are “among those taken into account”, rule number 6 makes it clear that the list is not meant to be exhaustive. As mentioned it must also be seen in relation to for example the responsibilities in rule number 2. E.g. a vessel carrying hazardous cargo or transporting passengers must consider the additional risk when determining safe speed. A vessel navigating in an area of particular environmental sensitivity must consider the potential danger of her fuel or oil cargo, etc⁶.

The term “safe speed” does not mean that setting a high speed under good conditions is precluded.⁷ If a ship is involved in a collision it does not necessarily follow that she was initially proceeding at an unsafe speed. In clear visibility, collisions can generally be attributed to bad look-out, or to wrongful action subsequent to detection, rather than to a high initial speed.⁸

⁶ Allen (2005) p. 177

⁷ Allen (2005) p.175-177

⁸ Cockcoft (1996) p. 26

I will not make any further attempt at discussing in a general sense what can be looked upon as safe speed. This would be far outside the scope of this thesis. I will for the following concentrate on the case law in relation to safe speed. I will start with safe speed and restricted navigable waters, then in relation to bow- stern wakes, restricted visibility and at the end small crafts at night.

2.3.2 Safe speed in areas of restricted manoeuvrable waters

A larger ship may need 10 or 15 ship lengths to perform a crash stop when proceeding at normal service speed at the open sea. This often means several kilometres. When entering waters with restrictions in manoeuvring space due to shallow water or a solid shore, service speed will usually not be safe and the speed must be reduced. Also hazards resulting from reduced line of sight due to the surrounding geography, number of other vessels in the area, hydrodynamic effects, such as bow cushion, bank suction and interaction between ships, can generally be eliminated or reduced by a reduction of speed.

Also in the case law, regarding collisions between ships, it is at times quite self-evident that one of the ships did not proceed at a safe speed under the given circumstances. In such cases the conclusion that this was one of the major causes is often quite close. An example of this can be found in ND-1991-96 *Kristine Søybye – Habicht II*. In this case the heavy loaded cargo ship *Kristine Søybye* held such a high speed through a narrow channel that she simply was not able to keep as near to the outer limit of the channel on her starboard side as she should have according to rule number 9. In a bend of the channel the excessive speed brought her too far into the port side of the channel and she collided with the meeting ship *Habicht II*. The actual speed over ground was easily established by average time/distance calculations and did not leave much room for discussion whether it could be looked upon safe speed or not. Similar circumstances are to be found in ND-1986-79 *Nordnorge – Coaster Debby*.

In other cases there is more room for reasonable doubt. In ND-1997-1 the passenger vessel Stena Germanica 25.000 gt with 640 passengers on board avoided by mere chance a collision with Nokturnus a 23.000 gt tanker fully loaded with diesel oil. It was restricted visibility with a distance of sight of about 150-200 metres and the ships passed each other with a clearance of about 5-10 metres. The incident took place in the approaches to Gothenburg. The area is characterised by narrow waters and several curves, which make the navigation challenging. Both ships were warned by the VTS some minutes before the collision of the other ships position. The master of Stena Germanica realised that he would meet the other vessel in a narrow curve. He knew that such a situation would be dangerous since both ships would need more manoeuvring room in a curve. He therefore picked up speed in excess of 16,5 knots in order to be able to meet the other vessel after the curve. This manoeuvre was successful, the ships met some hundred metres after Stena Germanica had finished its curve on a place there were more available water. However, Nokturnus was positioned in the middle of the channel due to shallow water on the starboard side and Stena Germanica had come slightly more towards the port side of the fairway than usual.

The accident investigators stated that they had no basis to conclude that the speed had a determinant influence of the outcome of the incident. The court did not question this and also concluded that failure to reduce speed neither was determinant for the situation.

Another case that involves manoeuvring in narrow waters is ND-2001-1 Stena Jutlandica – Brevik. The passenger vessel Stena Jutlandica, which is 184 metres long and 28 metres (wide) arranged, by agreement on the VHF, to overtake the chemical tanker Brevik, which is 85 metres long and 12 metres wide. After the agreement had been made and Stena Jutlandica had gained speed in order to perform the overtaking, Brevik also started to pick up speed. She most likely exceeded the local speed limit and the overtaking therefore took much more time than expected by Stena Jutlandica. At a certain time Brevik actually proceeded at a higher speed than Stena Jutlandica, who then chose to increase the speed even more in order to finish off the overtaking situation. At some point the ships have most

likely been influenced by suction, either between the ships or between one of the ships and the shoreline. The suction effect is influenced and boosted by an increase of speed especially in shallow or narrow waters. The ships, which had been proceeding at parallel courses with a distance between them of approximately 75 meters, suddenly collided at a rather wide angle without any drastic manoeuvres by the rudder on any of the ships. The channel was 210 metres wide at the place of the collision. The master of Stena Jutlandica was prosecuted for negligence in relation to his duties to give way in an overtaking situation and in relation to good seamanship. The court concluded that it was not sufficiently proved that the master had been negligent with regard to his give way duties or that the manoeuvres had not been in harmony with good seamanship. However, the court did go quite far at saying that Brevik, despite accepting the overtaking, had gained speed in excess of the speed limit and that this largely influenced the cause of the collision. In other words, in a civil case concerning distribution of liability for the incident, Brevik might have been forced to argue well to avoid liability under the safe speed requirement.

Another case concerning suction took place at Iceland. In ND-1994-45 Bakkafooss a 3539 gt containership was proceeding into the harbour entrance at Vestmannaeyar Harbour at a speed of 5-6 knots. A side wind contributed to the ship drifting towards one of the breakwaters and the master and pilot had to increase to half speed ahead. Due to suction from the breakwater and a steep mountain wall on one of the sides, the ship did not react as normal to the rudder, and the ship collided into several moored vessels. The court concluded that it was blameworthy to proceed into the entrance at a speed of 5-6 knots. The speed most likely contributed to the suction from the breakwater and the rock. IOW the master must have been in a dilemma, if he had chosen a lower speed, it would have meant lower steering speed and stronger influence by the wind. The bow thruster could perhaps have helped him off, since it is more efficient at lower speeds; however the master was likely to be damned at whatever speed he chose. That was also reflected in the judgement which concluded that the ship should have had a tug at the stem. The harbour authorities and pilot was blamed for not requiring this, since they had previous experience from similar incidents with ships of this size in the harbour entrance.

The question of steering speed was also raised in ND-1999-33 – Strömme Kanal. The local ferry Strömme Kanal overtook a queue of pleasure crafts in a narrow channel. The ferry exceeded the speed limit in the canal and bumped into one of the pleasure crafts. The prosecution authority claimed that the manoeuvring was not to be considered as good seamanship and that the excessive speed was one of the elements that formed part of this evaluation.

The master claimed that due to the shallow and even bottom construction of his vessel, he simply had to keep such a high speed in order not to lose control due to drift caused by influence of the wind. However, the court stated that “if the construction did not allow him to stop or reduce speed, he should not have chosen to proceed through the narrow channel where reductions of speed must be expected due to both the speed limit and other traffic”.

2.3.3 Safe speed in relation to bow- stern wakes

Also damages caused by bow- or stern wakes are relevant when considering the safe speed requirement. There have been some cases where moored vessels have been damaged by the wakes or disturbances of passing vessels. It is a precondition for imposing liability in such cases that the moored vessel were moored in a proper way. ND1994-3 is an example of this. The master of the passenger ship Stena Scandinavica was prosecuted for having passed the moored passenger ship Black Prince too close and at too high speed, thereby causing disturbances and suction in the water. This caused a gangway to fall down and put the passengers of Black Prince at risk. The investigation by the court only proved a slight degree of negligence on behalf of the master of Stena Scandinavica, and the damages on the gangway could largely be explained by poor mooring by the crew of Black Prince. The master of Stena Germanica was therefore free of charge.

In ND-2001-349 the owner of a high speed ferry was sued by the owner of a barge for damages caused by stern wakes while the barge was moored within a harbour area. There

was a public requirement that vessels navigating within the harbour area should manoeuvre at a moderate and secure speed. The ferry's speed of 40 knots could not be characterised as moderate, but seen in relation to the vessels manoeuvre characteristics it was not looked upon as insecure. The vessel had a low stopping distance and high manoeuvrability, and the stern wake was quite insignificant when proceeding at 40 knots. It was emphasized that the stern wakes would be higher at lower speeds. The manoeuvring was therefore not looked upon as unjustifiable. The master of the ferry could not have anticipated the damages to occur and the owner of the ferry was therefore not liable to pay for the damages.

The line of thinking from ND-2001-349 was also attempted in a recent public prosecution against three operators of relatively large pleasure crafts. They were charged for lack of due care and for manoeuvring their vessels at an unsafe speed that created large stern waves, which put other operators of pleasure crafts in the area at risk. They had by far exceeded the local speed limit, but they claimed that they were not liable with regard to the charge of excessive stern waves. They stated that the stern waves were smaller when proceeding at the level of speed they had kept during the incident, than if they had slowed down. However they did not manage to convince the court of this. Witness observations pointed in the other direction and they were found guilty of charge.

2.3.4 Reduced visibility

The Colregs demands especially attention and due care when manoeuvring in low visibility. The safe speed requirement in rule 6 is supplemented with rule 8, which requires a reduction of speed or full stop if there is a large a risk of collision. Rule number 19 repeats the requirement of safe speed during restricted visibility and demands every vessel to reduce to lowest steering speed or stop unless there is no danger of collision. It also states that "a vessel which detects by radar alone the presence of another vessel shall determine if a close-quarters situation is developing and/or risk of collision exists. If so she

shall take avoiding action in ample time”. Rule number 7 states that if there is doubt whether such a risk exists, it shall be deemed to exist.

However, a vessel making proper use of radar will normally be justified at going at a higher speed than what would be acceptable for a vessel which does not have the equipment or does not have the equipment in functioning order. Still, in many situations, it does not mean that it is safe to travel at the same speed as is considered safe in good visibility. Before the 1972 Colregs, vessels were required to travel at moderate speed in low visibility. As mentioned above, case law developed a rule of thumb saying that moderate speed meant that the ship should be able to stop at half the distance which could visually be seen by the eyes of the observer. Today, the rule might be appropriate for a vessel without radar, but a vessel that is making proper use of radar for example on the open ocean, cannot realistically be expected to more or less stop when the fog becomes too dense. Also, a strict compliance to such a rule might lead a ship, which is well capable of stopping at half the distance, to proceed at an unsafe speed when other factors should have been taken into account.⁹ I will mention some examples where case law has discussed safe speed in low visibility and in relation to the use of radar.

In ND-1987-154 both the OOW on *Dronning Ingrid* and the Master of *Trailer Express* were fined for not having reduced speed when they lost radar contact with each other in low visibility. The ships subsequently collided and their errors were looked upon as grossly failures in relation to the Colregs. Also in ND-2000-515 *Southella – Murmansk*, the master of *Southella* was strongly criticised and the ship apportioned the main liability for the collision since the speed had not been drastically reduced after losing radar contact with *Murman*, which he knew was on a crossing course.

Another example of safe speed discussion seen in relation to low visibility and the use of radar can be found in ND-1993-17 *Freja – Amorella*. This was a public prosecution against

⁹ Allen (2005) p. 199

the master of the local ferry Freja. He was charged for negligence and lack of due care when manoeuvring the ferry across a channel. The ferry almost collided and passed only 20 metres ahead of the much larger ferry Amorella. At the time of the incident the visibility was reduced to about 50-75 metres. The master of Freja had positive knowledge by radar observation that the other ship was approaching in the channel 1000 metres to the starboard. He also had all reason to believe that it was a large ferry proceeding at 15 knots. He made an error of judgement, and thought he would be able to pass ahead of the ship. While underway he failed to make use of information displayed by radar which indicated that the passing distance would be less than he had reckoned. According to his testimony in court the radar was influenced by disturbances, making it more difficult to interpret the radar picture. Instead of reducing speed as required by rule number 6, 7 and 19 he pressed on and thus put him into a position where he had no choice but to continue at safe speed. The collision was most likely avoided by the master of Amorella, who at an early stage became aware of the developing situation and reduced speed.

The master was found guilty of charge. The court emphasised that he had knowledge that a vessel was coming from starboard and that it most likely was a large passenger vessel. The fact that the radar picture was influenced by disturbances should have made him more cautious. He should have reduced speed or stopped while he still had a choice, and passed behind the other vessel. The failure to take these precautions and instead press on with a considerable risk of a serious accident was a breach of good seamanship.

However, the court also discussed whether the speed of Amorella could be characterised as safe in relation requirement in rule number 6 and 19. Amorella was a relatively large passenger vessel, 169 metres long and 27 metres wide, approaching a channel 1000 meters wide in very restricted visibility at a speed of 15 knots. It is not clear whether the whole of the channel was navigable or not, neither if it was narrow in relation to rule 9, nor if there was much traffic. It seems as the channel was relatively open with good radar land. The court emphasizes the vessels good radar and concludes that the vessel with the use of

its radar and reduction of speed in all probability would be able to avoid any collision at this speed. It was therefore looked upon as safe.

Another collision case that had some similarities to the Freja – Amorella case with regard to the speed requirement, was ND-1994-64 Øresund – Olfert Fischer. In this case Øresund proceeded at a speed of 11 knots, which in relation to the circumstances was not looked upon as safe speed. The evaluation emphasised that the vessel was in the approaches to Copenhagen, that it in dense fog attempted at a starboard-starboard meeting situation with Olfert Fischer without making use of the radar to monitor how the situation developed. Despite several changes in course and speed it did not systematically use the radar to see whether the CPA was satisfying. The court concluded that it should in ample time have taken precautions to avoid collision by reduction of speed, full stop or change of the course.

Another example of how failure of making use of radar information influences on the evaluation of safe speed is found in ND-1999-432 Tarehav – Fjord Master I. In this case the court surprisingly made use of the “half distance rule”. A chemical tanker of 1174 gt and total length of 77 metres entered a fjord that was not to be looked upon as narrow in relation to rule 9. The fjord was open with sufficient room for manoeuvring. The traffic density was not high, but there was a small vessel on a meeting course. The passing distance to the small vessel was by radar observation found to be satisfactory. Fjord Master I proceeded at full speed 13 knots, when the meeting vessel misinterpreted its radar and made several small alterations of course which put it straight ahead of Fjord Master I. The court concluded that Fjord Master I had not been proceeding at safe speed since it was not possible to stop at half of the visible distance which was about 100 metres. The court emphasised that Fjord Master should have used the radar more actively the last minutes in order to discover the changes of course by the small vessel, and that a reduction of speed would have given more time to evaluate the situation, perform an avoiding action or stop. It must be noted that this is the only case in the period from 1977 and to the present day

where I have seen an example of the half distance rule. It is a lower court decision and must perhaps be treated with some care.

The last example from case law of safe speed in low visibility is ND-1999-293 Color Viking – Tungenes. This case concerned failure to reduce speed in order to avoid a difficult traffic situation ahead. The visibility was reduced to about 0,5 nm or 1000 metres. Color Viking, which is a passenger vessel about the size of Øresund and Stena Germanica 20.500 gt, was proceeding in a channel which was not narrow in relation to colreg 9. It was open without much curves and about 2 nm of manoeuvrable water. Color Viking was proceeding at service speed at 20 knots on a southerly course in the port side of the channel. The radar showed that it would meet a vessel on a crossing course from the port further to the south. This vessel was approaching from a crossing fjord and had a westerly course towards the North Sea. Color Vikings radar showed that the other vessel would pass 0,9 nm ahead of Color Viking. However, the other vessels intention was to turn northwards and head up the same channel as Color Viking was heading down. Color Viking did not acknowledge this possibility, and by its position in the channel and high and unchanged initial speed created a difficult situation. The court concluded that 20 knots was to high speed for this type of vessel in this area in low visibility. In addition the court emphasised that Color Viking should have anticipated that such a difficult situation could arise and should have reduced speed and changed course before the situation became critical.

Looking at the overall picture, the use of radar is naturally quite central in relation to safe speed in low visibility. Both ND-1987-154 Trailer Express – Dronning Ingrid and ND-2000-515 Southella shows that speed should be drastically reduced if the radar is not working properly or signals is lost. Foreign case law indicates that in such a situation the half distance rule might be appropriate¹⁰. Both the case with Freja and Øresund shows that improper use of the radar is determinant for the safe speed. In all the cases, the available manoeuvrable water was important. In the incident with Øresund, it was also determinant

¹⁰ Allen (2005) p.199

that it was high traffic density and also a difficult situation ahead. Amorella is of quite similar type and size as Stena Germanica, Øresund and Color Viking. She was not found to be negligent with regard to the safe speed requirement even though she was proceeding at 15 knots in a relative narrow waterway. She was equipped with a good and well functioning radar, and used it properly to recognise a developing situation, and thus avoided a collision by reduction of speed.

Seen in relation to these cases one might ask why Stena Germanica was found to proceed at safe speed. She held a high speed initial into an area of narrow passages with several curves which requires special attention. It seems like it initially was not possible to monitor the traffic situation behind the curve sufficiently on radar before she came closer to the curve. The cases above indicate that in such a situation the speed should be reduced. When the VTS reported that Nokturnus was on the way it was only one nautical mile left to the start of the curve. She would most likely not be able to stop, and the high initial speed resulted in no point of return like in the case with Freja. If it was possible to monitor the situation sufficiently on radar, the most sensible thing to do would be, like in the case of Color Viking, to slow down at an early stage to avoid the difficult and dangerous situation to develop at all.

2.3.5 Small craft and safe speed in darkness

Almost every year there are several collisions between small pleasure crafts taking place in the darkness during the night. Some of these result in public prosecutions in the court. Very often these accidents have causal factors as insufficient navigational lights, alcohol and high speed. As mentioned earlier, the Safe speed requirement in rule number 6 states that every vessel shall at all times proceed at a safe speed in order to be able to take effective action to avoid collision and be stopped at a distance appropriate to the circumstances and conditions. Among the factors to be taken into account according to the list in rule 6 are:

Weather conditions, navigational hazards, at night the presence of background lights such as from shore lights, manoeuvrability of the vessel, traffic density and the state of visibility.

A question that very quickly arises is whether the darkness in itself has an impact on the understanding of the word visibility. According to the definition in rule number 3(1): “The term ‘restricted visibility’ means any condition in which visibility is restricted by, fog, mist, falling snow, heavy rainstorms, sandstorms or similar causes”. In other words, darkness is not included on this list. Even though it is dark, we are still able to see the stars on the night sky millions of kilometres away. The traditional view has been that the navigational lights make up for the visibility lost due to the darkness. This view is evident in ND-1980-74. In this case a small craft came at surfing speed about 15 knots into a narrow strait and collided with an anchored sailing vessel, which did not have any visible anchor light. The visibility was very good, but it was too dark to see the contours of objects within the vessels stopping distance. The arbitration court concluded that the requirement for safe speed in rule number 6 did not mean that it is blameworthy to manoeuvre a small vessel at surfing speed within such waters where other vessels or objects in the water shall be marked with lights.

The decision was elaborated and modified some years later in a new arbitration case ND-1983-343. Also in this incident a small pleasure craft collided at surfing speed with an anchored vessel at night. The anchored vessel did not have any anchor light and admitted some liability for this, but also claimed that the pleasure craft had manoeuvred at too high speed. The pleasure craft had not spotted the anchored vessel before at a remaining distance of 10 metres. A speed of 20 knots is about 10 metres per second. The vessel was anchored outside areas where other vessels normally navigate. In such areas vessels with a total length not exceeding 7 metres are allowed to anchor without anchor lights cf rule 30(e). The anchored vessel was not less than 7 metres, so the exception to the anchor light requirement was not relevant. However, the court found that the pleasure craft should have kept better look-out and reduced speed when he was navigating in the darkness along the shore, even though he knew the area well. The liability was shared. IOW outside areas

where vessels normally navigate, the duty of care with regard to the safe speed requirement is more stringent.

Another case that discussed the problem of safe speed in darkness was ND-2000-36. In this case two pleasure crafts collided at night in an area with dense traffic of pleasure crafts in the summer. It was a dark summer night and the collision happened in the middle of a fairway. The vessel that was run down did not have any navigational lights. It was heavily loaded with several persons aboard and was proceeding rather slowly. The vessel that ran into the other held a speed of 20 knots. The weather was good, but due to the darkness it was not possible to distinguish objects in the darkness at a distance of more than 10-20 metres.

Both the operators were found to be blameworthy for the incident by the lower courts. The operator of the vessel that held 20 knots brought the case to the Supreme Court. In the judgement the Supreme Court emphasised that the operator of the colliding vessel was familiar with the area. That there was no official speed limit at the place and that there were no geographical circumstances which would call for special attention and care. It was in the middle of the fairway and there would be less traffic at night. Since the run down vessel did not have any navigational lights and had little freeboard due to heavy loading, the operator of the vessel that ran into the other at 20 knots, could not be blamed for not having anticipated that there could be any hindrance of such a kind in his way. With regard to the circumstances, the court did not find the surfing speed of 20 knots to be particularly high.

Also in ND-2003-327 a minor majority of the judges reached a similar conclusion when evaluating a collision between two pleasure crafts in the darkness of the night. One of the vessels, a day cruiser, was navigating at surf speed of 17 knots while approaching a harbour area. This vessel was carrying navigational lights. The other vessel, an open motor boat, was heading in the opposite direction at about 10 knots. The two persons aboard were on their way home after a drinking party in the town. This vessel was either not having any

navigational light at all or was showing a hand held white light. The operator of this boat saw the oncoming day cruiser at the last minute and tried to steer away. It was too late and the day cruiser crashed into the open motorboat at 17 knots. One of the persons in the open motorboat died as a consequence of the collision. The operator of the day cruiser did not see the motorboat at all. The weather was cloudy with occasional rain showers and at times quite much wind.

The court was to consider whether the operator of the day cruiser had been negligent and whether such negligence had caused the other persons death. There was considerable doubt whether the collision had taken place within the actual harbour area, where there was a speed limit, or if it happened in the approaches to the harbour, where there was no such defined speed limit. The majority of the court concluded that it had happened within the actual harbour area, while the minority concluded that it had happened outside in the approaches to the harbour. Based on this and the fact that the operator of the day cruiser knew the area well, the minority did not find it negligent to navigate at surfing speed of 17 knots in a relatively open water, even though it was dark and not any good weather conditions.

One of the judges that concluded that the accident took place within the harbour area found it to be only slightly negligent to navigate in this area at surf speed. This judge also thought that there was not sufficient causal link between this negligence and the death of the person aboard the motor boat. Both the minority that concluded that the accident had happened in the approaches and this one judge based their assumptions on the conclusion that the motor boat had not had any navigational lights. Together they constituted a majority and the operator of the day cruiser was free of charge.

The minority on the other hand concluded that it was without doubt negligent to navigate at surf speed within the harbour area at night. Even though it was late at night, it was quite foreseeable to meet other vessels either with or without navigational lights. It was summer

and the night from Saturday to Sunday. In the darkness of the night, even a handheld white navigational light would be hard to spot, since it very easily could be mistaken to be a background light from the town that lay straight ahead of the day cruiser. These are circumstances which the operator should have taken into consideration. It was considered to be a clear causal link between the negligence of navigating to fast and the death of the person in the motor boat. The fact that the motorboat might not have had any navigational light was not looked upon as sufficient to free the operator of the day cruiser of the charge. It was the high speed that was the dominating cause to the collision. A lower speed would have significantly reduced the risk of collision, especially the risk of such a tragic outcome.

In other words, the case indicates not very surprisingly that the location of the area navigating within is quite important. The outcome of the case was influenced by the fact that several of the judges based their evaluation on the premise that the accident happened in a relative open area without many geographical disturbances. As such their decision was quite much in line with the outcome of the Swedish ND-2000-36. Among the judges that concluded that the accident happened within the harbour area, the majority concluded that it was a clear breach of the safe speed requirement. They pointed at several of the circumstances mentioned on the list in rule 6 which is to be considered when determining safe speed, such as: cloudy and not very good weather, background lights which can make navigational lights disappear, traffic density, etc. It must be noted that it was summer and Saturday night and quite foreseeable to meet small pleasure crafts with insufficient navigational lights. This should be well known among the operators of pleasure crafts in this area, and as pointed at by the chairman of the case, it should form part of the consideration when determining safe speed in order to be able to avoid collision.

As a conclusion it is fair to say that case law has been hesitant to let navigation in darkness influence the safe speed requirement, at least in areas where there is relative open water, not too many geographical obstructions or high traffic density. However the view of the minority in the last judgement and the shared liability in ND-1983-343 shows that for certain areas the general picture is open for challenge.

2.4 Risk of Collision -rule 7

This rule requires the OOW to gather sufficiently information about the trafficable picture. The OOW must throughout the watch observe the traffic in order to both detect new vessel appearing in the vicinity, and also constantly monitor whether vessel already discovered may come on a conflicting course. The OOW is to avoid taking decisions based on scanty information, and if there is doubt whether there is a risk of collision, the OOW shall act as if there is such a risk.

When monitoring the trafficable picture, the OOW is to make use of all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If another vessel is visually sighted on a crossing course, it may be appropriate to take compass bearings in order to determine if there is a developing risk of collision. In inshore waters, where the other vessel may be properly identified and the pilots speak the same language, it may be suitable to call for the other vessels intention on the VHF radio. In offshore waters this is not recommended since confusion may easily arise due to language difficulties and uncertainty whether it is the correct vessel that is responding to the VHF call. The latter problem has partly been solved by Automatic Identification System (AIS).

Radar is to be used under most circumstances both in good and bad visibility. The rule emphasises the use of radar both as a means to detect new vessels appearing on the scene, and as an aid to effectively determine whether there is a risk of collision with some of the vessels already on the scene. If used properly, the radar will give an early warning of changes of course and speed by other vessels. The rule therefore also emphasise that the radar must be adjusted properly for example by proper radar range. In ND Canturia – Myrmo both vessels were found to have used their radars on a too short radar range in relation to their speed, giving them too little time to evaluate the situation and take avoiding action. Also ND Maria Smith was apportioned liability partly as a consequence of wrong radar range. Inherent in the understanding of the rule lays also the fact that the OOW must be capable of making sufficient use of the radar, both radars as such and the actual radar on

the relevant ship. In ND Fjord Master I – Tarehav, the OOW on Tarehav did not understand the relative motion on the radar properly and thereby changed course and created a situation which ended in collision. Tarehav was therefore apportioned the main liability.

2.5 Action to Avoid Collision - rule 8

Rule 8 is designed as an attempt to, as far as possible, avoid that vessels come into close contact with each other. It addresses the actual manoeuvres to avoid risk of collision. The manoeuvres are supposed to be positive, made in ample time, and if possible, large enough to be readily apparent to another vessel observing visually or by radar. A succession of small alterations of course and/or speed should be avoided. The manoeuvres shall result in a safe passing distance to other vessels and the effectiveness of the manoeuvre shall be monitored until the other vessel is passed. In open water an early change of course may be the most effective action to avoid a close encounter if it does not result in another close encounter. If necessary to avoid collision or allow more time for assessment of the situation, the speed shall be slackened or taken all off by stopping or reversing the engine. Rule 8 was central in ND-199-293 *Color Viking – Tungenes*, where *Color Viking* was blamed for not having reduced and changed course at an early stage in the developing situation, thus creating a difficult situation and risk of collision.

The rule is very relative and must to a large degree be assessed in relation to the special circumstances at the scene, e.g. in relation to traffic density, the available room for manoeuvring, the manoeuvrability of the relevant vessels, etc. The rule also attempts to give some guidance for vessels that are encompassed with the obligation of “not to impede” other vessels. This is relevant in rule 9, 10 and 18. For example a vessel that is fishing in a separation zone in relation to rule 10, shall not impede the passage of any vessel following a traffic lane. According to rule 8 f (i), the fishing vessel shall take early action to allow sufficient sea room for the safe passage of the other vessel. According to 8 f (ii) the fishing vessel will have this obligation to the bitter end. However, according to 8 f (iii) the vessel that is not to be impeded remains fully obliged to comply with the other Colregs if a risk of collision develops. In other words if such a situation develops, the vessel that is not to be impeded may become obliged to give way. This opens for complex interpretations; especially in dense traffic situations. The OOW must understand, not only own obligations, but also the obligation of the surrounding vessels.

2.6 Narrow Channels - rule 9

This rule regulates navigation in narrow channels or fairways. Vessels proceeding along such channels or fairways “are to keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable”. In ND-1991-96 *Kristine Sjøby* was found to be blameworthy with regard to this since she held such a high speed through a curve in a channel that she was not able to maintain her position in the starboard side of the channel. She subsequently collided with *Habicht II* and was apportioned the main liability for the incident.

Rule 9 also address several “not to impede” situations. Sailing vessels and vessels with a total length less than 20 metres are not to impede the passage of vessel that can only navigate within the narrow channel or fairway. Vessels engaged in fishing shall not impede the passage of any other vessel navigating within the channel; and vessels about to cross a channel or fairway shall not impede the passage of a vessel which can only navigate safely within the narrow channel or fairway.

Whether a channel or fairway is to be considered as narrow or not is in many cases not so obvious. In ND *Strømme Kanal – Madam Mim*, it was obvious since the channel was only wide enough for two vessels to pass side by side, While in ND *Color Viking – Tungenes* it was not. In that case *Collor Viking* proceeded along a passage that was first narrow and then widening up. It was questioned whether the channel should be looked upon as a whole or whether only the area where the collision took place should be considered when determining whether the channel was narrow in relation to rule 9. The court concluded that it would not address the whole channel and stated that the collision took place at a stretch where the channel were 2,2 nautical miles wide. It was not looked upon as narrow. However passages of approximately 2 nautical miles have sometimes been considered to be narrow channels, at least in foreign case law. Foreign case law has also indicated that the narrow channel rule has been held to apply also 100 metres outside the buoys marking the

harbour entrance, but not to a recommended route between buoys where the vessels could easily have gone safely outside.¹¹

¹¹ Cockroft (1996) p. 61

2.7 Section II – Conduct of Vessels in Sight of One Another

2.7.1 The manoeuvre rules 13-15

This section consists of the rules from 11-18. These rules stipulate the actual manoeuvre duties between the vessels and serves as the main working tool to the mariner in his ordinary professional life. Most of them are quite absolute and does not need much consideration. I will only mention the headlines of the most relevant.

Rule 13 concerns all vessels in overtaking situations: “Any vessel overtaking any other shall keep out of the way of the vessel being overtaken”. Rule 14 outline the duties of power-driven vessels in meeting head-on situations. If there is risk of collision, both vessels are to alter its course to starboard. Rule 15 specifies the duties of power-driven vessels in crossing situations: “The vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel”.

2.7.2 Action by Stand-on Vessel - rule 17

This rule addresses the responsibility of the vessel that is not to give way in relation to rule 12-15. This vessel is obliged by 17 to maintain its course and speed. However it may take precautions to avoid risk of collision if the other vessel is seemingly not taking any avoiding steps. This is transferred into a duty if the ships have come so close that the collision cannot be avoided only by steps of the give way vessel.

Inherent in the rule lays several difficult issues; e.g. when to take action by the privileged vessel? The OOW need to have knowledge of both owns ships manoeuvrability but preferably also the other ships manoeuvrability. If own ship is fairly small and manoeuvrable the oow can wait until the other vessel is quite close. If own ship is a large heavily manoeuvred vessel and the other smaller and more easily manoeuvred, there is hardly any room for waiting at all. Certainly not waiting for the point in time where the

other vessel has come into a position where it cannot avoid the collision only by its own manoeuvre. Own ship may therefore in such situations avoid the duty of maintaining course and speed by referring to rule number 2 (a). This obliges the OOW to take “precautions which may be required by the ordinary practice of seamen or by the special circumstances of the case”. The consequence must be to continue the course and speed until the last moment, at which the privileged can avoid the collision alone.

The duty of the privileged vessel to participate in avoiding a collision applies irrespectively of whether the vessel has contributed to the developing situation or not. A breach of the duty may lead to liability. An example of this is to be found in ND-1988-112 Salla-Abakanles. In this case the master of Salla was found to be negligent since he had not taken action to avoid collision at an early time when it became evident that there was a risk of collision. Salla had been the privileged vessel. He also should have used the VHF to alert the other vessel. A classical example the application of rule 17 is to be found in ND-1967-180 Ingerfire.

2.7.3 Responsibilities between vessels - Rule 18

This rule arrange the hierarchy between vessels: A power driven vessel shall keep out of the way of vessels not under command, with restricted ability to manoeuvre, vessels engaged in fishing, etc.

2.8 Section III - Conduct of vessels in Restricted Visibility

2.8.1 Conduct of vessels in Restricted Visibility - Rule 19

This rule only applies during restricted visibility. In such a situation the manoeuvre rules in Section II will not apply. The situation must be determined in relation to the Section I rules and rule 19. The rule is influenced by the fact that not all vessels have radar and accurate AIS. It therefore defines some general rules for all vessels and some additional rules for vessels equipped with radar. It repeats the safe speed requirement, urge all power-driven vessels to have the engine ready for immediate manoeuvre and requires all vessels that becomes aware of a risk of collision forward of the beam to reduce speed to steering speed and if necessary to stop. Vessels equipped with radar are given some negatively defined advice on how **not** to manoeuvre.

The rule does not give absolute solutions upon how to manoeuvre like the Section II rules. Instead it requires caution. Many collisions happen during low visibility and investigations shows that many mariners misinterpret the significance of the rule and instead apply the section II rules also in low visibility.¹²

There is much case law regarding rule number 19. A central case is the Supreme Court decision ND-2000-515 Southella-Murman. The court concluded that local practice among fishing vessels in the Barents Sea that the Section II rules would apply regardless of there being restricted visibility or not, could not prejudice the actual wording in the Colregs which states that Section II rules does not apply in reduced visibility.

¹² Salinas (2006) p. 351

3 Appportionment of liability

3.1 The 1910 Brüssel Convention - implementation into Nordic Law

3.1.1 Introduction

The 1910 Brüssel Convention was established on the initiative of Comité Maritime International (CMI) and constituted modern rules on collision liability. The convention was adopted by most major maritime nations except the United States of America, and has been incorporated into the Nordic Maritime Codes – cf the Norwegian MC §161.

The convention is based on culpa liability, and ship-owners will therefore only be liable towards the meeting ship if either the ship-owners himself or someone he is vicariously responsible for cf. MC § 151, is to blame for the collision.

The collision liability rules in The Maritime Code must be looked upon as flexible frame rules. They give legal basis for claims of compensation where there is fault by the ship-owner or by someone he is responsible, cf MC §151. They do not stipulate the conditions for compensation and gives no guidance regarding the criteria for what is to be considered due care in relation to prudent seamanship or navigation. To find an answer to the latter, one have to seek guidance in other sets of rules like the Collision Regulations, the Ship Safety Act, the regulations for equipment aboard ships, the STCW-Convention, etc.

The collision liability rules differ from normal rules for damages in tort especially in two circumstances. The colliding parties have a prorate responsibility, based on their degree of fault, towards injured third party – except for personal injuries where they are joint and severally liable; and strict liability for collision between ships is not possible as a

consequence of The 1910 Brüssel Convention. However the term “collision between ships” –used in MC §161 – does not encompass contact with other structures than ships, such as bridges or docks, in such situations strict liability may be applied. It is therefore important to determine what constitutes a collision and what is to be encompassed in the term “ship”.

3.1.2 The term “Collision”

With the term collision between ships, it is primarily thought of physical touch between the ships; either when making headway through the water or when being moored at the dock. It is irrelevant whether the collision is due to the ships own force, or due to impact by wind, current, etc.¹³. The 1910 Brüssel Convention article 13 has, like the Nordic Maritime Codes, a rule which also opens for collision liability if a ship by its manoeuvring cause damage to another ship without there being any physical touch between the ships cf MC §163. Examples from case law of this is ND 1957 s. 358 Oslo “Varangberg” – Varangberg had to anchor in narrow waters due to engine failure; an overtaking ship avoided collision by using the engine at full power astern, but struck a rock and was damaged. More recent examples of collision liability without contact is to be found in ND 1978 s. 139 “Stolt Condor” and ND 1995.282 “Veabas”.

3.1.3 The term “Ship”

The term “Ship” is in most instances obvious and at first glance it would be natural to think that it has got an accurate definition within maritime law. In Scandinavian maritime law the content of the term has to be defined and seen in relation to the context it is supposed to be used in. Kurt Grönfors uses in his article “Sjørättens kollisjonsansvar” an example of a

¹³ Lødrup (2005) n. 253

pontoon crane with its own means of propulsion. The main purpose of the crane is to lift heavy loads and it has restricted manoeuvrability, still it is designed to and capable of moving through the water, and in a collision context it must be looked upon as a ship. While on the other hand, a seaplane will not be classified as a ship in a collision context. It is capable of moving through the water, but it is not the main purpose of its design. It is meant to be used in the air and is not tied to the marine environment. It is not a precondition that the construction is capable of moving with its own source of propulsion; a barge designed to transport cargo will fall inside the definition of a ship and also a floating oil rig cf MC §507. A floating dock which is designed or meant to be situated at the same location through out its life of service or a non floating oil production rig, will not be regarded as a ship in a collision context, neither will fishing nets, pipelines or cables¹⁴, cf ND 2000.100 DSC Solveig Holm, where a seismic cable was found not to be an appurtenance to a ship or a ship by itself.

3.1.4 Collision with other objects than ships

Collision with objects that do not fall within the definition of a ship must be judged in accordance with the ordinary rules of tort law. The ship-owner may be found liable if he or someone under his responsibility, cf MC §151 is at fault. Strict liability has only been invoked in special circumstances. Two Norwegian Supreme Court cases has concluded with strict liability ND 1921 s.401 “Neptun” – collision with a bridge, and ND 1952 s. 320 “Sokrates” with a dock. In both cases the damage was due to technical failure in the reversing engine, which could not be blamed the ship-owners or their servants.

¹⁴ Falkanger (2004) p. 213

3.1.5 What damages may be compensated?

Neither the 1910 Brüssel Convention nor the Maritime Code gives much guidance, only that the one at fault shall compensate damage to ship, goods or to persons aboard the ship. One must look to other rules on estimation of compensation in order to find an answer to what damages the injured party may have compensated -in Norwegian Law the Act Relating to Compensation in Certain Circumstances of 13. June 1969 No. 26 § 3-4 (Skadeserstattningsloven).

As a starting point, the injured party shall be compensated the full extent of his adequate loss resulting from the collision, this means total loss or damage to the ship, salvage fees or loss of hire. Whether or not damage to a ship`s own passengers or cargo may be compensated depends on the underlying transport and liability rules for passengers and cargo respectively.

The collision liability will also be subject to the Global Limitation Rules, cf MC §171. The distribution of compensation for damages in the wake of a collision may be complicated involving many parties. A further discussion of the subject is not relevant for this thesis.

3.1.6 Distribution of liability

It has been usual to make rather rough apportionments of collision liability - typically 50/50, 75/25 or 0/100. I will now discuss the Collision Liability rules in relation to the different apportionments of liability that have been used in civil collision cases throughout the investigated period. I want to see how the tendency of apportionments has developed in the period, discuss some of the case law involving the different apportionments, and see if there can be drawn any common characteristics out of the different groups.

3.2 Only one ship at fault - § 161, (1)

3.2.1 Introduction

Both practical lives aboard ships and also everyday life ashore show that accidents are seldom due to only one cause or “accident factor”, as the scientists prefer to call it. At first glance one factor may seem to be the major triggering event, but further analysis of the accident often reveals several contributing factors which were necessary links in the chain of events leading to the accident or to further damage. Not all such contributing factors are relevant in the distribution of liability between the parties – I will come back to this in the chapter regarding “The Evaluation of Fault”. Nevertheless case law shows that in many cases both parties can be blamed for contributing factors and the liability is shared.

However in 42% of the cases, which were considered in accordance with the collision liability rules in the investigated period, ended with a 0/100 division of the liability. In 54% of the 0/100 cases both ships were underway at the time of collision, while in 46% of the cases one of the ships were moored or anchored. The latter group is characterised by technical failure in the colliding vessel while approaching the dock. The failure results in reduced manoeuvrability and subsequent collision. The first group is often characterised by a serious breach of the give way rules by one of the parties, while the other party has done what possible to avoid the collision.

An example of this is ND 2002.210 Maria Smith and Sava Lake. In low visibility in a pilot boarding area Maria Smith made a direct violation of rule number 19 d (ii) in the Collision Regulations. The court found that the captain had not kept proper look-out and that he did not have sufficient view of the situation in relation to rule number 5 and 7 respectively. The manoeuvre was sudden and unexpected and found to be grossly negligent. The court concluded that the Captain on Sava Lake had monitored the situation sufficiently on radar and that he had taken proper action by changing course and reversing engines to avoid the collision. Maria Smith had failed to take avoiding action by changing course and speed when the situation had arisen, something which could have easily been done. Maria Smith was given the full blame for the collision.

Also the ND 2001-157 Strand–Vitin and the ND 1995-282 Mermoz-Veabas cases led to full blame on one side. In the first case grossly failure to keep look-out resulted in no compliance of a give way rule. It was discussed whether the ship with the right of way - Vitin – should be apportioned some liability for waiting too long with avoiding action when it became apparent that Strand would not do so cf. rule 17. Vitin, which was already proceeding at slow speed, used both sound signals and tried to establish contact by VHF. It was clear visibility and no distractions. The court concluded that the Officer on Watch (OOW) on Vitin had no reason to expect the other ship not to take avoiding action.

In the other case the OOW, which was on his first watch ever on Veabas, made a fundamental failure when manoeuvring in a heavy current in a narrow channel. He lost control and violated a give way rule. Mermoz grounded when taking avoiding action. Even though the ships were not in physical contact with each other, Veabas was given the full liability and had to pay damages for the grounding. Besides pointing at the wrong manoeuvre by Veabas as the main triggering event which led to liability, the judge also criticised the Captain and the ship-owner for putting the new officer, which was unfamiliar with the vessels manoeuvre characteristics, solely in charge of the navigation through a challenging area.

3.2.2 Technical failure as the main triggering event in 0/100 cases

Another typical situation leading to full liability on one side is technical failure which can be blamed the ship-owner or his servants; typical failure in the manoeuvre controls when manoeuvring in harbour and subsequent collision with moored vessels. The ship-owner ought to have discovered the failure by better care and maintenance or should have installed an extra set of manoeuvre controls – e.g. manual operation of the gear or the steering engine. This was the case in ND-1986-292 Skudenes. The ship-owner could not be blamed for the technical failure, but was given full liability against some moored fishing

vessels since there was no possibility for any emergency operation of the reversing gear. Also in ND-1994-47 Libas-Koralhav the technical failure in the gear control could not be blamed the ship-owner, but here an emergency manoeuvre control of the gear was installed. The OOW claimed that he had not enough time to activate the emergency control, but the court concluded that he would have been able to bring the vessel to a halt if he had used it. Libas was therefore fully liable towards the moored vessel.

In cases of collision with moored vessels it is easy to expect that the colliding ship shall carry the liability. This is however not always the outcome. In two cases of compensation for damages following such collisions in the period, also the moored vessels were found liable cf ND-1994-45- Bakkafoss and ND 1983-343 below in the chapter of 50/50 apportionments.

The burden of proof will often be of importance for the outcome. The claimant must prove that the collision and damages is due to negligence from the other party. The defendant will have the burden of proving that it has not been acting negligent in any respect. It must be proved that the technical failure could not have been foreseen or avoided by better maintenance, that emergency equipment were installed and the crew responded in an appropriate way when the failure became apparent. In ND-1980-261 the colliding vessel was not able to prove that the technical failure or faulty manoeuvre was not due to its own negligence, and had to carry 100% of the liability.

In ND-1980-277 it was showed that the colliding vessel had not been negligent. Since Both the 1910 Brussel Convention and also the Maritime Code prevents strict liability in cases of collision between ships, both parties had to pay their own damages. I will come back to this later in the chapter 3.4 Accidental Collisions.

3.2.3 Vessels adrift due to adverse weather

In Frode Ringdals article he stated that vessels adrift during adverse weather conditions due to broken moorings often lead to no liability, or both had to compensate own damages¹⁵. In the period 1980 – 2004 I only found two cases where vessels had been adrift due to broken moorings in stormy weather. Both cases led to 100% liability for the owner toward owners of other vessels which were struck by the vessel adrift. They were both, after reasonable doubt, found to be negligent with regard to the strength of their moorings. Two cases are off course not enough to make general assumptions. However the lack of cases going in the other direction, may make it tempting to speculate whether there is a trend that it is put more weight on the involved participants duty to show due care, than other contributing factors such as adverse weather conditions.

3.2.4 Restricted visibility

Restricted visibility was a contributing factor in 23% of the total number of collision cases, but it was only one of the collisions in restricted visibility that led to a 0/100 apportionment – cf. above ND-2002-210 Maria Smith – Sava Lake.

Frode Ringdal mentioned in his article that 100% liability for collisions in restricted visibility was quite common before 1950, and then decreasing afterwards. This is obviously still the case, and perhaps not so surprising due to the introduction of radar and improved skills upon how to make use of it. It can partly also be explained by the structure in The Colregs. In restricted visibility the normal manoeuvre rules that positively describes what action to undertake, do not apply. Instead rule19, in addition to general advice of safe speed and alertness in restricted visibility, only negatively states what action not to undertake if another ship is observed on radar. In other words there is no positive give way vessel. Both

¹⁵ Ringdal (1974) p. 382.

vessels have the same duty of care with regard to avoid any conflicting situation, and this usually leads to shared liability.

No 0/100 cases in the period, focused mainly on the failure to give sound signal or the failure to carry navigational lights.

3.3 Both to blame - § 161, (2)

3.3.1 Introduction

In 37% of the all the collision cases both parties were found to be blameworthy for the incident. The total relevant costs following each collision were subsequently distributed between the parties according to the degree of liability for the collision. The evaluation of each party's liability for the collision is discretionary and based on the circumstances of the case. The estimates are usually quite rough 50/50 and 75/25 are the dominant solutions. If the circumstances do not suggest a certain distribution, the losses are divided equally.

I will now comment and give some examples of the different distributions that have been used for the investigated period. The distributions that have been used are: 50/50, 75/25, 2/3-1/3, 60/40 and 80/20. One case also had 82,2/17,8 which corresponded to the costs on each side.

3.3.2 50/50

The damages are supposed to be proportioned in accordance with the faults committed on each side. However if the circumstances give no grounds for apportionment in any definite proportion, the damage will be apportioned equally.

The latter solution was used on Island in ND-1994-45 Bakkafoss. The captain of Bakkafoss was blamed for manoeuvring with too much speed within a narrow harbour area and not making use of the anchor when the risk of collision with the moored vessels belonging to the harbour authorities was evident. The harbour authorities were blamed for not having informed of previous experiences of suction from a mountain wall in the harbour entrance, for not advising on a tug at the stem of Bakkafoss and not removing their own vessel from the dock, where previous experiences suggested that the vessels affected by the suction would end up.

Also in ND-1983-343 the liability was apportioned 50/50. The case concerned collision in darkness. A pleasure craft hit an anchored fishing vessel. The pleasure craft were proceeding at surf speed at night. It was outside the normal fairway and close to the shore. The court concluded that the speed was too high considering the darkness and the area navigating within, and the operator of the pleasure craft had not kept sufficient outlook. On the other hand the fishing vessel had no anchor light. The failure to carry anchor light was given similar weight as the excessive speed and failure to keep proper look-out, since several fatal accidents have occurred where smaller vessels have been anchored without lights, leaving the vessel hard to spot in the darkness.

Also ND-1994-237 involved collision between smaller vessels. Two open pleasure crafts (A+B), fitted with outboards, collided in darkness and partly reduced visibility. A was the give way vessel and hit B in his port side. A was found guilty of not using the navigational lights and of insufficient outlook. B on the other hand, was also guilty of not showing due care and keep sufficient outlook. He failed to make sure that a passenger, that was to hold a torch with white light, really did so. He was also influenced with alcohol. The court found that both parties had shown a similar degree of negligence and apportioned the liability 50/50.

The 50/50 apportionment was being used in 12% of all the collision cases or 31% of all the collision cases that ended with a division of liability.

3.3.3 60/40

I have only recorded one case with this solution for the investigated period. That was in ND-1995-115 Trekroner – Klitjyden. Both parties were found to have shown serious negligence. Trekroner had as a starting point the main responsibility to avoid a close encounter between the ships, but the court wanted to stress that Klitjyden had a contributory responsibility to monitor the situation, in order to be able to take action if it became evident that the other party was not fulfilling its obligations as a give way vessel.

Trekroner was proceeding in a coastal zone outside the traffic separation zone. Being quite a large ferry it is doubtful whether it should have been there at all. The court concluded it should at least have shown extra care with regard to keep a sharp look-out, since vessels of its size would not be expected in this area. Despite this, Trekroner did not keep enough attention to Klitjyden by, as a give way vessel, not allowing it a wide enough berth. Trekroner's course line indicated a small closest point of approach (CPA) ahead of Klitjyden, and the CPA became zero when Klitjyden started gaining speed as a part of his fishing operation shortly before the collision. Klitjyden on the other hand, had not kept sufficient look-out for quite a long time while preparing his fishing nets. He was navigating in an area with high traffic density and he should have kept regularly look-out at short intervals also when preparing his fishing nets.

3.3.4 2/3 – 1/3

This allocation of liability seems to be a resemblance of the past. It was only used one time in the period, while it was more common in the past. The allocation 75/25 has obviously taken its place. In the one case ND-2001-254 Risholm – Lofotferje I it was perhaps used as a solution in between of 60/40 and 75/25. The case had several similarities with ND-1995-115 Trekroner - Klitjyden, but the court might have sought to highlight the negligence by the give way vessel in this case somewhat more than in the Trekroner – Klitjyden case. In this case, a fishing vessel – Risholm - collided with a ferry – Lofotferje I - just after departure from harbour. Risholm had the duty to give way. The court put considerable weight on the fact that the master of Risholm had observed a ship on its starboard side some minutes before the collision, without investigating whether there was any risk of collision. The vessel simply continued without any effective look-out until the time of the collision. In the Trekroner – Klitjyden case, the OOW on Trekroner had monitored the situation, but made a mistake by not allowing the fishing vessel a wide enough berth. Risholm's failure of not invoking measures to avoid a close encounter at all, was perhaps of a more serious nature, than making a negligent and fatal misjudgement while taking avoiding action.

Also in this case the duty of the privileged vessel to keep look-out and by all means monitor the situation, in order to at an early stage determine whether there were a risk of collision, became a crucial part of the case. Lofotferje did not keep look-out, and despite the ship being in an area where conflicting traffic could be expected, the man dedicated for the task was put to do another job. The OOW was busy adjusting his radar nr. 2 and neither discovered or attempted at any avoiding action until the actual collision. Lofotferje was therefore apportioned 1/3 liability. This is a little less than what Klitjyden was allocated. However Klitjyden was not only inattentive, but also negligent by gaining speed without ascertaining whether it was safe to do so in relation to the traffic around the ship.

3.3.5 75/25

This allocation was used in 12% of the total collision cases and in 31% of all collision cases that ended with a division of liability. It is significant that almost all the cases concern collisions that have taken place in reduced visibility. Only one of the cases is not influenced by this. In fact half of all the collision cases involving reduced visibility have been solved by this allocation of liability. This is quite interesting considered that the normal manoeuvre rules in the Colregs do not apply in reduced visibility, meaning that both ships have, as a starting point, the same obligation to give way. It would be tempting to assume that the statistics of apportioning of liability in restricted visibility cases also would reflect this, and be closer to a 50/50 share. However, as mentioned earlier, the Colregs have a somewhat special structure with regard to reduced visibility situations. The manoeuvre rules in Section II do not apply in low visibility. The rules in both Sections I and III are subjective in contrast to the absolute objective manoeuvre rules in Section II. They attempt to give guidance to what is considered safe speed, how to avoid risk of collision, how to manoeuvre to avoid a collision etc. They are relative rules subject to interpretation in each separate case in relation to what can be looked upon as good seamanship in each situation.

Before I continue I will make a small digression. If we look at the accidents at sea, human errors are said to be a main contributing factor in a majority of the incidents.

Inattentiveness, failure to make use of available information, exaggerated confidence in available information technology and thereby minimizing safety limits, ignorance towards making early and well defined alterations of course in order to show other ships your intentions, different understanding of what is to be considered a safe limit etc. The chances of mishaps in a system, based on subjective interpretation by the participants, are quite high¹⁶. Many scientists, investigating how to improve safety in the traffic, prefers technical improvements to control the traffic flow, rather than making efforts to improve the human element¹⁷. However, the scientists also conclude that the success of rules in the traffic is dependent on the participants having a feeling of risk of being caught and that it will lead to clear sanctions. The risk of being caught is not relevant in this context, but looking at the total picture of the apportionments in the collision cases, it is tempting to think that the courts have focused on the importance of clear sanctions for negligence in relation to the guidance rules. In the 75/25 cases involving restricted visibility, all vessels had the same duty to give way, their actions would have to be evaluated in accordance with the guidance rules, and the one who were found to be more negligent in respect of these rules received quite a large degree of the blame. In the both to blame situations which led to 60/40, 2/3-1/3 and some of the 50/50, there were vessels with clear obligations to give way, still the privileged vessels received a large degree of the liability for negligence in relation to the guidance rules. By a strict application of the guidance rules, the courts may have sought to take a clear stand against inattention and ignorance of safety limits, which seems to be a problem with regard to the human errors.

An example of a 75/25 distribution is to be found in ND-2000-515 Southella – Murman. Both are fishing vessels and the incident took place in the Barents Sea in restricted visibility. Murman had started setting the trawl when the collision occurred. Southella was not fishing and in the minutes before the collision it had been without radar contact with

¹⁶ Belcher (2002) p. 216

¹⁷ Elvik (1997) P. 29

Murman. Despite the lack of information of Murmans position, Southella relied on the last available radar information, which indicated a Closest point of approach (CPA) of 0,3nm on Murmans starboard side. Instead of taking precautions like reduction of speed and/or alteration of course as prescribed by the guidance rules and also rule 19, Southella most likely maintained course and speed. This was found to be very blameworthy.

Murman had by radar observations become aware of Southellas approach on a crossing course, but misunderstood the Colregs and thought that the manoeuvre rules in Section II also applies in low visibility. In confidence that Southella would give way, Murman failed to take precautions to avoid a close encounter and decided to start fishing. The fishing operation required an increase of speed, which contributed to the collision. The court found that Murman had been negligent towards the guidance rules in Section I: 6 –safe speed, 7-Risk of collision, 8-Manoeuvre to avoid collision and also regulation number 19 which only applies in restricted visibility. Murman was therefore apportioned 25% of the liability.

Another example of 75/25 is ND-1983-251 Cantuaria - Myrmo. The ships collided in the North Sea in low visibility. Both ships were criticised for using too short range on the radar – both at 6 nm. Myrmo, which was apportioned 25% of the liability, was also blamed for making incorrect use of the information from the radar. A subsequent alteration of course based on this information, resulted in a more imminent risk of collision, than if no alteration of course had taken place. Cantuaria was found to be more blameworthy, since the vessel had proceeded at full speed, 19 knots compared to Myrmo's 9 knots, which also was full speed. It was also put weight on the fact that it was questionable whether Cantuaria had made use of its radar prior to the incident.

3.3.5.1 Common responsibility to avoid risk of collision

Most encounters between two vessels, seen in isolation, are solved by relatively clear instructions by the Colregs upon how to manoeuvre. Either one or both vessels have an obligation to give way. If a ship is in breach of such a more or less absolute obligation, then both the guidance rules and the Collision Liability rule number 2 implies that both vessels are responsible to avoid collision, irrespective of visibility. Rule 17 also clearly outlines this common responsibility for good visibility situations. Several of the cases mentioned shows that the courts have put weight on this and it is perhaps a natural consequence of the pro rata liability imposed by the Collision Liability Rules. I will only shortly mention two cases where the common responsibility have been particularly emphasised by the court.

In ND-1991-96 *Kristine Søyby – Habicht II* the two vessels collided in a narrow channel or harbour area in good visibility. *Kristine Søyby* was given 75% liability for having proceeded through a narrow channel and into a harbour area with such a high speed that it was not possible to keep as near to the outer limit of the channel/harbour area on her starboard side as she should have in accordance with rule 9.

Habicht II on the other hand, was apportioned 25% liability for not having taken necessary precautions and stopped, when it should have been apparent that *Kristine Søyby* would not be able to fulfil her obligation to keep to the starboard side of the channel.

The other case was a restricted visibility collision – ND-1994-64 *Olfert Fischer – Øresund*. The outward bound naval vessel *Olfert Fischer* and the inward bound ferry *Øresund* collided in the approaches to Copenhagen 15 minutes after they had observed each other on radar. The court found that *Øresund* had not been proceeding at safe speed, considered the low visibility in an area with heavy traffic. *Øresund* was also found negligent for not having monitored the situation sufficiently by radar and not having taken precautions to avoid the collision by reducing speed or changing course. *Øresund* was therefore apportioned the main liability of 75%.

Olfert Fischer was equipped with advanced radar systems manned by specially trained tactician officers, who monitored Øresunds progress from minute to minute. When the OOW became aware of the risk of collision he reduced speed from 11 to steering speed 5 knots, which was found to be satisfying by the court. He also changed the course 8 degrees to starboard and shortly before the collision the speed was reduced to more or less 0. Despite the attempts to avoid the collision, the court found that a change of course to starboard of 8 degrees was not enough to give a clear signal to Øresund that he was trying to avoid a collision by a port to port manoeuvre. Olfert Fischer was therefore apportioned 25% liability, which perhaps can appear as a little harsh, considered that the ship was more or less run down in a situation where rule 19 requires safe speed and utmost care. However the court obviously wanted to highlight the necessity of large and clear manoeuvres and that both ships have a responsibility of avoiding collision.

3.3.6 80/20

This apportionment was used in 7% of all the collision cases and in 19% of all both to blame cases. 20% was the smallest apportion of liability throughout the period. Smaller failures which could not be looked upon as significant in regard to the common duty to avoid risk of collision were left to rest and obviously ended as 0/100 apportionments. An example of this is the Rt-1986-105 Nordnorge – Coaster Debby. Nordnorge came at large speed and at the wrong side round a bend in a channel that qualified as narrow in relation to rule 9. Coaster Debby which was heading in the opposite direction had to turn hard to starboard in an attempt to avoid the other vessel. When turning to starboard Coaster Debby did not use the sound signal as prescribed by rule 34a. The failure to use sound signal was looked upon as insignificant and without particular influence on the collision, as the time factor would not have allowed Nordnorge any possibility to change course in another direction after hearing the sound signals. Nordnorge therefore was apportioned 100% liability.

I will only mention one example of a 80/20 situation where one ship was mainly blameworthy, but the other ship had to share some liability for not having shown due care to avoid the collision: ND-1984-439 Seakittie – Tinto. Seakittie proceeded at large speed at the port side of a fjord that was to be considered as narrow water in relation to rule 9. According to rule 9 Seakittie should have been on the starboard side of the fjord. Tinto which was going in the opposite direction, did therefore not expect any meeting vessels at his side of the fjord, but was apportioned 20% liability for failure to keep lookout and for waiting too long before reducing speed.

3.4 Accidental Collision - § 162

When the court has not found any of the colliding parties to have acted negligent in any respect, each party has been left to cover its own damages. This has also been the result in several cases where the parties have been able to fulfil the burden of proving negligence by the other party. In the period investigated, 17% of all collision cases were solved by this apportionment.

The majority of the cases involved technical failure, and these cases are closely connected to the 0/100 apportionment. Of all the civil liability collision cases 18% were due to technical failure and they were evenly split between 0/100 and 0/0. The result of the cases is usually dependent on the burden of proof. As mentioned above under 0/100, if it is not proved that the ship with technical failure has been negligent; both ships will most likely have to cover their own damages. If negligence is proved, the ship with the technical failure has been apportioned full liability. The black and white result is a consequence of most of the cases being situations where the other ship was struck while berthed. It could not be blamed for not having taken steps to avoid the accident. Most of the cases of technical cases resulting in collision with berthed ships have been influenced by the Supreme Court decision ND-1971-36 Marna Hepsø. In this case the Supreme Court put the burden of proof on the colliding ship, who managed to prove no negligence with regard to failure in the reversing system, and both ships had to cover their own damages.

The failures have to be sudden and unexpected and a direct cause of the collision, typically a failure in the reversing- or steering engine. It is doubtful whether all kinds of technical failures that lead to a collision will qualify for no liability¹⁸. Frode Ringdal mentioned in his article an example of radar equipment failing during restricted visibility. He said that: “In addition to the courts being likely to find negligent circumstances, a defect radar should not be relied upon, and if it is not working at all, one should navigate according to the rules

¹⁸ Ringdal (1974) p. 392.

as if there were no radar aboard. The technical failure has to appear in such a critical moment and in such a way that it is not possible to avoid the accident with any natural precautionary action.”

In ND-1990-362 Oddtun – Austvåg it was discussed whether failure in an autopilot should lead to no liability according to MC §162 or liability in relation to MC §161. In a meeting situation Oddtun`s autopilot suddenly and unexpectedly failed. The ship made a sharp turn to port and collided with Austvåg. The representatives of Austvåg claimed that an autopilot is not a device of fundamental importance for the seaworthiness of the ship. It is a device that makes the navigation easier and serves as an addition to the ships ordinary steering system. However this was obviously not accepted by the court, who concluded that no negligence was proved, either with regard to maintenance of the autopilot or precautionary action when the failure appeared. Both parties had to cover their own damages.

In most of the no liability cases it has not been necessary to determine whether the Colregs or other regulations have been breached. Neither has human failure been especially relevant.

3.5 Liability after necessity situations

The rules in the Maritime Code regarding collision liability must be supplemented by the rules in the Act Relating to Compensation in Certain Circumstances of 13. June 1969 No. 26 § 1-4 (Skadeserstattningsloven), concerning liability for damages resulting from necessity. The tortfeasor is obliged to compensate damage that has arisen as a consequence of a legal act to save his property from a situation that threatens to occur. However a discussion of liability under this is outside the scope of this thesis.

3.6 The evaluation of fault

As mentioned earlier the Collision Liability rules in the Maritime Code does not give much guidance with regard to the evaluation of fault. The court has to supplement with the rules for damages in tort. Case law within other parts of this field has shown a development where discretionary evaluations of all reasonable participating factors more often than before have lead to shared liability. This perhaps partly describes the similar development over the years in case law for the collision cases.¹⁹

However, even though there may have been a tendency towards more discretionary evaluations, with more weight on the more relative rules of good seamanship rather than absolute manoeuvre rules or sound signals, the evaluation itself must be based on objective terms. The judge may put himself in the shoes of the acting party and decide whether the actions were prudent with regard to how the circumstances in the case appeared at the scene. This evaluation must be seen in relation to how a normal competent mariner of same rank would have acted in a similar situation, and also in relation to what would be reasonable to expect with regard to what is customary within this field, written standards of procedure, public regulations, etc. It will also be important to determine what potential the action had in relation to cause damage, how great a risk for the damage to incur and how serious it could be expected to be. Whether it was sufficient time and possibility to prevent the damage must also be determined²⁰.

The evaluation of fault is objective in the sense that all tortfeasors should be judged according to the same standard or level for what is to be considered prudent action. Negligence in regard to certain rules results in liability. However the standard of prudent action or seamanship in relation to e.g. the Colregs may be given different content in relation to different types of ships under different types of circumstances. A small pleasure

¹⁹ Ringdal (1974) p. 392.

²⁰ Falkanger (1999) p. 196

craft with good manoeuvrability and short stopping distance may perhaps keep a higher speed in relation to rule 6 than a large crude carrier in a harbour area with relatively high traffic density.

Due to the principle of objectiveness, it is not often that individual circumstances, such as tiredness, illness, inexperience, etc by the crew, shall be given much weight.

3.7 Conclusion - compared to earlier period

In his article Frode Ringdal stated that there had been a development throughout the period from a tendency of relatively black and white decisions, that was to a large extent based on the more absolute rules in the Colregs, e.g. the manoeuvre rules or rules of lights and shapes or sound signals; to more discretionary decisions resulting in a division of liability. At the end of his investigated period the number of 0/100 apportionments had been reduced, and more weight put on participating factors by both parties, such as failure to invoke proactive measures to avoid risk of collision, e.g. look-out, safe speed, good seamanship, etc. He anticipated that the development would continue and that there would be fewer cases where minor causes were excused. Earlier the excuse of minor faults had often led to 0/100 apportionments. Instead the proactive element would be further highlighted and there would be a larger tendency towards shared liability.

When looking at the figures for the two periods it is obvious that there has been a reduction in the number of 0/100 cases. However that is for the overall picture including collisions with berthed vessels. When only counting cases where both ships have been moving and a discretionary evaluation of both ships proactive actions to avoid risk of collision is relevant, the figures remain exactly the same – 43% of all such cases ended as 0/100. There were almost a similar increase in the number of cases ending in no liability due to MC §162 as there was reduction in the overall 0/100 cases. Perhaps as a consequence of the result of the Marna Hepsø case.

Looking at the both to blame cases there is more or less a similar number of cases ending with this result as earlier. The number of 50/50 being slightly reduced and 80/20 slightly increased. The finer results like 90/10 have not been used in this last period.

Even though the statistical figures have not moved distinctly in the way anticipated, it must be admitted that such figures must be treated with care. The number of cases is not so very high and mere coincidence might have had an influence on the result. Distribution of

liability following a collision is also often solved by private agreement rather than ending in court. The number of collisions has not been reduced in the same way as number of collision cases in court. It is possible that cases where the fault as a starting point has been quite equal on both sides, more often are agreed upon privately, while cases where one party might have to carry the whole burden are more likely to end up in court.

Anyway when looking at the both to blame cases it is quite evident that the main point in Ringdals anticipation for the future development has proved to be right. As mentioned above in the chapter of the 75/25 cases, the courts put much weight on the proactive duties to avoid risk of collision. The judgements typically most frequently referred to rules from Section 1 of Part B of the Collision Regulations. The most usual being in ranged order: Rule 6 - Safe speed, rule 5 - look-out, rule 8 -action to avoid collision, rule 9 - narrow cannels and rule 7 - risk of collision.

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